No. 12915

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. J. O'LEARY, Deputy Commisisoner, Fourteenth Compensation District, under the Longshoremen's Act

Appellant

vs.

COASTAL NAVIGATION COMPANY, a corporation; FIREMEN'S FUND INSURANCE COMPANY, a corporation; and MRS. GENEVIEVE LONG,

Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case arises upon a complaint for judicial review of a compensation order filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, U.S. Code, Title 33, Chapter 18, Section 901 *et seq.*

Section 21(b) of the Longshoremen's Act, *supra*, provides:

"If not in accordance with law, a compensation

order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Jurisdiction of this court upon appeal is invoked under Section 1291, Title 28, U. S. Code.

STATEMENT OF THE CASE

On May 2, 1948, Frank Long, the deceased, while employed as a caretaker of the SS COASTAL GLACIER, sustained injuries (a strangulated hernia) from which he died on May 7, 1948. His widow filed claim for compensation with the appellant deputy commissioner under the provisions of the Longshoremen's Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A., Section 901 *et seq.* The employer and insurance carrier controverted the claim upon the ground that the deceased was a member of a crew and hence not covered by the Compensation Act, 33 U.S.C.A., Section 903 (a) (1), which excludes "a master or member of a crew." A second ground of objection raised was that the injury did not arise out of and in the course of employment.

The deputy commissioner heard the evidence of the parties and thereafter filed the compensation order complained of, in which he found that the de-

ceased was not a member of a crew and that he did sustain the injury in the course of his employment.

The employer and insurance carrier thereupon filed in the court below a proceeding for judicial review of said order pursuant to Section 21(b) of the Longshoremen's Act, 33 U.S.C.A., Section 921(b). The court below held that, although the deceased sustained an injury which arose out of and in the course of his employment, he was a member of a crew and therefore not within the coverage of the Longshoremen's Act. The said compensation order accordingly was set aside. (T. 14, 30)

The present appeal followed from the order or orders thus entered. (T. 39).

QUESTION INVOLVED ON APPEAL

Was the evidence before the deputy commissioner such as to *compel* a finding that the deceased was a member of a crew?

SPECIFICATION OF ERRORS

The court below erred in redetermining the question whether the deceased was a member of a crew, since there was substantial evidence in the record to support the deputy commissioner's finding that at the time of injury he was not a member of a crew but a caretaker.

SUMMARY OF ARGUMENT

The question whether an employee is a member of a crew is one of fact. (This is so even where the facts are not in dispute if different inferences may be drawn by the trier of the fact. *C. F. Lytle Co. v. Whipple, Deputy Commissioner*, 156 F. (2d) 155 (C.A. 9, 1946); *Contractors, PNAB v. Pillsbury, Deputy Commissioner*, 150 F. (2d) 310 (C.A. 9, 1945); *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner*, 309 U.S. 251 (1940); *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, Deputy Commissioner*, 137 F. (2d) 926 (C.A. 9, 1943); *Lowe, Deputy Commissioner v. Central R. Co. of New Jersey*, 113 F. (2d) 413 (C.A. 3, 1940); *Henderson, Deputy Commissioner v. Pate Stevedoring Co., Inc.*, 134 F. (2d) 440 (C.A. 5, 1943); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner*, 175 F. (2d) 863 (C.A. 5, 1949); *Delta Stevedoring Co. v. Henderson, Deputy Commissioner*, 168, F. (2d) 872 (C.A. 5, 1948).)

It is only where the facts permit of but one conclusion that the question whether in a particular case the employee is a member of a crew is withdrawn from the trier of the fact and decided as a matter

of law. In the instant case the deceased's work at the time of injury not only was not typically the work usually expected of or performed by a crew member but it was typically and essentially that of a caretaker. Since the deputy commissioner found in these circumstances that the deceased was not a member of a crew his finding in this respect should under the authorities have been left undisturbed.

ARGUMENT

I

THE EVIDENCE IN THE RECORD SUPPORTED THE FINDING THAT THE DECEASED WAS NOT A MEMBER OF A CREW WITHIN THE MEANING OF THE LONGSHOREMEN'S ACT.

(a) *The Findings*

The deputy commissioner in the compensation order complained of found the facts in part as follows:

> "That on the 2nd day of May, 1948, the deceased above named was in the employ of the employer above named at Seattle, in the State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by Fireman's Fund In-

surance Company; that the deceased entered the employ of the employer during the latter part of 1946 as Chief Engineer aboard the vessel "COASTAL GLACIER" at Ketchikan, Alaska; that in March, 1947, after having made one voyage in Alaskan waters the said vessel was brought to Seattle, Washington, and tied up at Ballinger Dock on Lake Washington; that except for the deceased, *the crew of the vessel was then discharged*, but deceased remained with the vessel in the capacity of caretaker and acted as Chief Engineer whenever the vessel was on a voyage under charter; that his duties consisted of keeping the engines in running order, charging the batteries, general care and maintenance of the vessel and to keep trespassers from boarding the vessel; that during the time the vessel was tied up at Ballinger Dock it was kept in readiness to sail on one day's notice and was on several occasions engaged under charter for fishing trips and for other purposes; that the last trip made by the vessel prior to May 2, 1948 was during September 1947, and that subsequent to that time the vessel remained tied up at Ballinger Dock; that the deceased lived aboard the vessel, prepared his own meals and was furnished with subsistence by the employer; that on May 2, 1948 while the deceased was descending the stairway leading to the engine room, he slipped and fell, in consequence of which he suffered a right strangulated hernia; that the deceased was admitted to the U. S. Marine Hospital on May 4, 1948 and died in said hospital on May 7, 1948 following an operation for the repair of the strangulated hernia; * * * that at the time of his injury the deceased was performing service for the employer in his capacity as a caretaker of the vessel COASTAL GLACIER and not as a member of the crew of said vessel; that the injury and death of the deceased arose out of and

in the course of his employment by the employer above named; * * *"

(b) *The Evidence*

Betty Marion Krafve, Medical Record Librarian at U. S. Marine Hospital, testified that she had custody of the clinical records of the hospital (T. 43) and that she brought the records pertaining to the illness and death of Francis L. Long (claimant's Exhibit 1, T. 79) identified as Register No. 51-020. These records show that the deceased arrived at the hospital by ambulance on May 4, 1948 with a condition of bilateral hernia, with strangulation of the ileum due to the hernia (T. 80); that the deceased gave the following history: that he slipped on the deck and wrenched himself, with immediate severe pain in the right lower quadrant and that he became aware of a mass in that region; that abdominal pain followed, with attacks of colic and vomiting; that the onset was May 2, 1948 and the symptoms became progressively worse (T. 80, 81). Said records further showed that the primary cause of death on May 7, 1948 was strangulation of the ileum in the right hernia (T. 82). The death certificate shows the same cause of death (T. 73).

Harlan C. Haas, testified as follows: That his occupation is that of caretaker for the Coastal Navi-

gation Company; that he takes care of the vessels COASTAL FOREST and COASTAL GLACIER and of the yard (T. 44); that he is a painter by trade and had never been a member of a crew; that he was approached by Mr. Long, the deceased, 2 or 3 days before the first of May 1948, to take care of the vessel during a projected trip to Minnesota which Long intended to take and was told that the job consisted of keeping the boat clean and charging the electricity (keeping up the batteries) (T. 46); that later he went to see Mr. Long at the latter's request; that Long was in his cabin and said that he had slipped and fallen when he went to the engine room of the COASTAL GLACIER (T. 47, 48); that Long seemed to be sick and did not feel good; that he obtained a doctor for Mr. Long at the latter's request; and took care of him until the ambulance came to take him to the hospital; that deceased's abdomen was swollen (T. 49, 50); then Haas stayed on at the boat and took over Long's duties; that the duties were to keep the COASTAL GLACIER and COASTAL FOREST clean (T. 51) and to keep trespassers off; *that he had no duties in connection with navigation of the boats;* that he had continued on duty to the present (T. 52); that he had been told by Long that Long was a Chief Engineer and had been with the COASTAL GLACIER for three years; that Long was

living on the COASTAL GLACIER when Haas first met him, and Long had told him he had to run auxiliaries which "charged electricity" (generated electricity) for the boats (T. 53); that since Mr. Long's death the engineering and maintenance of the COASTAL GLACIER have been attended to by John Nitson, a chief engineer who visits the COASTAL GLACIER once a month for the purpose of turning over the engines to keep them in working condition (T. 54); that both his duties and those of Mr. Long were on *both* boats; that a diesel engine (the so-called auxiliary engine) with an electric self-starter similar to that of an automobile is run every day for the sole purpose of keeping up the electricity (T. 57); that when Mr. Long was aboard the vessel the engines were kept in repair by Long, but when he, Haas, took over it was necessary to employ a chief engineer for that job; that Mr. Nitson, a chief engineer, looks over, checks and makes necessary repairs once a month (T. 57, 58); that he, Haas, is paid $250 per month and sleeps on board the COASTAL GLACIER (T. 58).

Allen H. Link, testified as follows: That he is Secretary, Treasurer and Director of the Coastal Navigation Co., owner of the vessels COASTAL FOREST and COASTAL GLACIER, which were acquired early in 1946; that the vessels were originally built

for war purposes and were called FS's; that there were two types, one 115 feet long and one 140 feet long built specifically for use in Alaskan waters; that they were purchased at a surplus sale and were intended to augment the company's Alaska Transportation Company service to Alaska in hauling freight and passengers to their own and other ports in Southeastern Alaska; that the vessels were brought down to Ketchikan, put in the yards (T. 59) and reconverted into combination passenger and freight vessels to put them into operation; that the COASTAL GLACIER was used for that purpose on one trip in the latter part of 1946 but the COASTAL FOREST never made a trip (T. 60); that a crew was hired consisting of approximately 9 or 10 and one trip of about a week's duration was made; that on the return to home port a union decided that the crew complement was too low and required that it be increased, and the owners felt that with additional expense for wages, the vessel could not be made to pay for itself on the projected trips and the vessels were tied up outside of Ketchikan until sometime in March 1947; that since they could not effect any change in the complement of the crew or make other satisfactory arrangements, the vessels were brought to Seattle in March 1947 for the purpose of chartering them as yachts on fishing or any other purpose of a

charter and the two vessels were tied at Ballinger Dock where they have been tied until this time (T. 61); *that the crews that brought the vessels down were discharged in 2 or 3 days*, the time it took to clean the vessels up, after which Mr. Long, Chief Engineer of the COASTAL GLACIER, was retained in that capacity for both vessels from that point until his death, and he was the only member of the crew that was retained (T. 62).

The witness further testified that the COASTAL GLACIER made the following trips between March 1947 and Mr. Long's death: That in August and September 1947 there was a fishing trip to Cape Flattery, a point just off the northern tip of the State; on June 27, 1947 a party was taken to the University of Washington Crew Race which was just in the Lake; and in September 1947 there was a fishing trip to the Campbell River in British Columbia. In August 1948 (after the deceased's death) the ship was taken out only for compass adjustments, and in September 1948 it again made a trip to Campbell River. Mr. Clapp (the owner of the navigation company) and his friends would act as Master, Mate and so forth and other than the engineer and cook there were no official crew members; that Mr. Clapp is the principal stockholder and the fishing trips were

primarily pleasure trips; that on the August and September (1947) trips Mr. Long was the Chief Engineer and on the trips of May 1947 and June 1947 Mr. Nitson was the Chief Engineer and Mr. Long went on the September 1947 trip (T. 64); that Mr. Long was custodian of both vessels with the duties of taking care of the boats; *that his major duties were to keep watch, and to keep the vessels clean, to keep them oiled and to report any major difficulties* (T. 64, 65).

It is believed that the evidence above referred to supports the findings of the deputy commissioner to the effect that at the time of injury (May 1948) the deceased was performing service in the capacity of caretaker of the vessel and not as a member of the crew within the meaning of Section 3(a) of the Longshoremen's Act as that section has been construed by the courts.

The courts have on numerous occasions had before them proceedings for review under the Longshoremen's Act, involving the question of whether the injured employee was or was not a "master or member of a crew" within the meaning of the Longshoremen's Act. From these cases certain well defined principles for determination of the question have evolved.

In the case of *South Chicago Coal and Dock Co. et al v. Bassett, Deputy Commissioner*, 309 U.S. 251 (1940), the question was whether the employee who worked on a lighter or barge in the Calumet River and Harbor and Indiana River and Harbor and whose *primary duty was to facilitate the flow of coal from his boat to other boats — removing obstructions to the flow with a stick* — was a member of the crew. The employee traveled with the vessel and performed some additional tasks, such as *maintenance* work and *handling the ship's lines.* He performed no navigational duties. He was described as a "deck-hand" by the captain. The mere appellation "deck-hand" however was held to be not controlling. The court held that the question whether the employee was a member of a crew was *one of fact* and that, where there was evidence to support the deputy commissioner's finding that he was not a member of the crew, such finding was final and conclusive. The Supreme Court said:

> "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not 'a member of a crew' turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner. Hence the Court of Appeals correct-

ly ruled that his finding, if there was evidence to support it, was conclusive and that it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial. We have so held with respect to the conclusiveness of the finding of the deputy commisisoner that an injury to an employee arose 'out of and in the course of the employment', *Voehl v. Indemnity Insurance Co.*, 288 U.S. 162, 166; as to the finding of the dependency of a claimant for compensation, *L'Hote v. Crowell*, 286 U.S. 528, *The Admiral Peoples*, 295 U.S. 649, 653, 654; and as to the finding that the employee had committed suicide and hence that compensation was not payable, *Del Vecchio v. Bowers*, 296 U.S. 280, 287. In the *Del Vecchio* case the question was with respect to the application of the exception made by paragraph (b) of section 3 with respect to 'Coverage', and we see no reason for a different view as to the application of paragraph (a) (1) of the same section.

* * *

" * * * The question concerns his *actual duties. These duties*, as the Court of Appeals said, *did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker.* What the court considered as supporting the finding of the deputy commissioner was that the *primary duty* of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. *Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual*

workers on the water.' Scheffler v. Moran Towing Co., 68 F. (2d) 11, 12. Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling." (Italics supplied)

In the case of *De Wald v. Baltimore & O. R. Co.*, 71 F. (2d) 810 (C.A. 4, 1934), cert. den. 293 U.S. 581, a similar question was involved. There the court said:

"* * * while Congress has not, in the act, definitely classified those persons who are entitled to receive the benefits under it, it is hard to conceive of one who would come more definitely within the meaning of the words 'harbor worker' than De Wald. His *main duties*, as found by the Deputy Commissioner, were the checking and supervising the loading and unloading of cargo from barges and keeping all records with regard to the cargo. Such work as he did in making fast lines at docks or alongside vessels and pumping water out of the barges was *incidental to his main employment.* He did not live upon the barge but went home every night.

* * *

"It is to us reasonably clear that Congress intended to except from the benefits of the Longshoremen's Act only those *persons ordinarily and generally considered as seafaring men*, at least only those employed on board a vessel having a master and crew.

* * *

"De Wald was not a member of the crew within the fair and common meaning of the words used in the excepting clause when we interpret the

clause as one intended to restrict rather than extend and when we consider the purposes and history of the legislation as well as the nature of his duties and the use of the barges upon which he was, from time to time, employed by the day."

In the case of *Pacific Employers Ins. Co. v. Pillsbury, Deputy Commissioner, and David E. Slawson,* 130 F. (2d) 21 (C.A. 9, 1942), this court stated that there was evidence to support the finding of the deputy commissioner to the effect that the employee was not a member of a crew. The court cited the case of *South Chicago Coal & Dock Co. v. Bassett, supra,* as authority for its statement that the determination of the question depends upon the employee's *primary* duties. The employee's duties in that case were stated to be as follows:

"The claimant, David E. Slawson, was employed at a monthly wage as a *deckhand* aboard the 'Crockett'. His work required that he live aboard boat for five days out of each week, and he could not depart from the boat without permission of the officer in charge. *During most of his working time he was storing sugar on the boat or assisting in the discharge of such cargo,* the boat being tied to a dock while such operations were carried on; and he helped to sweep up any sugar that spilled on the decks. *To a slight extent he handled the lines in tying and untying the vessel,* and also assisted in laying out and bringing in the cargo plank. He and others aboard were required to respond to lifeboat drill, and in the event of an emergency or failure of the steering apparatus, he could be called upon to

hold the wheel. Ordinarily, though, he slept while the boat was in motion. *When it was tied up and he was not otherwise engaged, he would do some painting and other maintenance work.* He had no duties to perform on shore, and all his orders were taken from the mate or the captain.
Slawson held a membership in the Deckhands' Union; had a 'Seaman's Certificate of Identification' and 'Certificate of Service', but did not have an able seaman's papers."

For other cases construing section 3 (a) (1) of the Longshoremen's Act, see *Schantz v. American Dredging Co.*, 138 F. (2d) 534 (C.C.A. 3, 1943); *Puget Sound Freight Lines, et al v. Marshall, Deputy Commissioner*, 125 F. (2d) 876 (C.C.A. 9, 1942); *Gulf Oil Corporation v. McManigal, Deputy Commissioner*, 49 F. Supp. 75; *Blaske et al v. Bassett, Deputy Commissioner of Emp. Comp. Comm., et al*, 35 F. Supp. 315 (Mo. 1940); *Harper v. Parker, Deputy Commissioner, et al*, 9 F. Supp. 744 (Md. 1935). Compare: *Hagens v. United Fruit Co.* 135 F. (2d) 842 (C.A. 2, 1943); *Beddoo v. Smoot Sand & Gravel Corp.*, 128 F. (2d) 608 (U.S. App. D.C. 1942); *Braner v. Brooklyn Eastern Terminal*, 46 F. Supp. 302 (N.Y. 1942); *Gonzales v. Riverside & Fort Lee Ferry Co.*, 43 F. Supp. 366 (N.Y. 1942).

In the *Wm. Spencer & Son Corporation v. Lowe, Deputy Commissioner, et al*, 152 F. (2d) 847 (C.C.A. 2, 1945) cert. den. 66 S. Ct. 1012, it was held that a

"*lighter captain*" is not a *member of a crew* within the meaning of Sec. 3 (a) (1) of the Longshoremen's Act. There the employee had mixed duties, some pertaining to pumping the hold, handling the lines when docking or casting off and making minor repairs, but primarily relating to loading and unloading cargo by means of a winch or "hoister". See also *Lehigh Valley R. R. Co. v. Lowe, Deputy Commissioner*, 68 F. Supp. 753 (N.J. 1947) involving a "barge captain" who was held to be not a member of the crew.

It will be seen from the foregoing authorities that the courts have generally construed the term "master or member of a crew" in Section 3 (a) (1) as having application to seamen or sailors who make up a "ship's company"; that is, seafaring men who live aboard vessels and are engaged in navigation, sign ship's articles, and engage generally in seafaring pursuits. Such a construction is in keeping with the distinction which has always existed between seamen "at sea" and others employed on local harbor craft. *Scheffler v. Moran Towing and Transportation Co., Inc., et al*, 68 F. (2d) 11 (C.A. 2, 1933). It was these seamen who were intended to be excepted from the coverage of the Act because, although a petition signed by 5,000 of them desiring to be included was filed with the Judiciary Committee which was considering the bill which became the Longshoremen's

Act (see Report No. 1767, 69th Congress, 2nd Session, Vol. 68, Part 5, pages 5907-5909); their leader Andrew Furuseth persuaded Congress to have them excluded. The reason advanced for their exclusion was that they had "ancient rights" which were valuable and which they did not desire to surrender for the rights they would have under the Longshoremen's Act. The remedies enumerated were: (1) maintenance and cure; (2) suit under the Jones Act; and (3) suit in Admiralty based upon the unseaworthiness of the vessel. In the instant case apparently there would be no remedy under (1) and (3) above. Under number (1) *supra*, a seaman is entitled to wages to the end of the voyage: *The Osceola*, 189 U.S. 158; *The E. H. Russell*, 42 F. (2d) 568 (D.C. E.D. N.Y. 1930). But where the vessel is not upon a voyage, there could be no payment of wages until the end of the voyage. Moreover, the remedy of maintenance and cure belongs to the seaman and dies with him. The remedy under (3) *supra*, also would not be available to a person in claimant's status because an employee working on a vessel by the day in a harbor who has the alternative of assuming or not assuming a risk may not recover for an injury resulting from the risk which he chooses to assume. *Scheffler v. Moran Towing and Tranportation Co.*, *supra*. Moreover, the injury in the instant case was

not due to the unseaworthiness of the vessel; and as a final reason, any right which the employee had in this respect would not go to his widow. The only "ancient" remedy of those enumerated *supra*, which may be open to persons showing sufficient status as "seamen" is that under the Jones Act, which is useless unless negligence on the part of the employer is established. Therefore the reasons which impelled the seafaring men to want to retain their ancient rights in preference to the right under the Longshoremen's Act substantially would not be present in the instant case; there is no remedy for the deceased's widow outside of the Longshoremen's Act.

The following quotation from *South Chicago Coal and Dock Co. v. Bassett*, *supra*, with relevant references to the Congressional reports and Congressional record gives the history of the amendment of the Bill as it relates to the change of the wording of the Bill from "seamen" to "members of the crew":

> "The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States (House Rep. No. 1767, 69th Cong., 2d Ses., pp. 1, 2, 20). They preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the bill was changed accordingly so as to exempt 'seamen'. Then, in its final passage, the words 'a master

or member of a crew' were substituted for 'seamen'. (Cong. Rec., 69th Cong., 2d Sess., vol. 68, pt. 5, pp. 5402, 6403, 5908;*Nogueira v. New York, N. H. & H. R. Co.*, 281 U. S. 128, 136.) We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were 'seamen'. *International Stevedoring Co. v. Haverty*, 272 U.S. 50; *Northern Coal Co. v. Strand*, 278 U.S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. *Southern Pacific Co. v. Jensen*, 244 U.S. 205. We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable."

The law should be construed to give meaning to the change in the Bill from "seamen" to "members of the crew". In view of the fact that apparently only the *seafaring men* wanted to be excluded from the Act, the law should be construed as not to affect the rights of harbor workers, of watchmen and caretakers.

(For a discussion as to the distinction between a "seaman" and a "member of the crew", see *Carumbo v. Cape Cod S.S. Co.*, 123 F. (2d) 991 (C.A. 1, 1941).

In the case of *Moore Dry Dock Co. v. Pillsbury, Deputy Commissioner, et al*, 100 F. (2d) 245 (C.C.A. 9, 1938), this court said:

> "Although the courts thus far [this was prior to the decision in *South Chicago Coal and Dock Co., et al v. Bassett, supra*] have not formulated a precise statement from which it can at once be determined just when an employee is a member of a crew and when he is a harbor worker, they are in agreement upon the principle that Congress, in the enactment of the Longshoremen's and Harbor Workers' Compensation Act, intended to except from the operation thereof only those employees ordinarily and generally considered as *seafaring men*, leaving that fact to be determined by the circumstances of each case." (Matter in brackets ours — also emphasis supplied.)

In the recent case of *Norton, Deputy Commissioner v. Warner Co.*, 321 U.S. 565 (1944) (where the court called attention to the fact that the employee had no duties "in connection with the handling of cargo") the court cited with the approval the statement in the *South Chicago* case, *supra*, to the effect that the question whether an employee is a member of the crew is one of fact for the deputy commissioner and that his finding thereon is conclusive where supported by evidence, *although the evidence may permit conflicting inferences.* Compare *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 131, decided subsequent to the Norton case, where the court said:

> "* * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act (44 Stat. 1424, 33 U.S.C. Sec. 901 *et seq.)*, that a man is not a 'member of a crew' *(South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251) or that he was injured 'in the course of employment' *(Parker v. Motor Boats Sales* 314 U.S. 244) * * * the Board's determination that speficied persons are 'employees' under this Act is to be accepted if it has 'warrant in record' and a reasonable basis in law." Accord: *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company*, 330 U.S. 469 (1947).

It could hardly be stated that a single employee of two vessels which are tide up to a dock and whose major duties, according to his employer, were to keep watch and to keep the vessels clean and oiled and to report any major difficulties was a member of a crew. The fact that at some time in the past he had been a member of the crew of one of the vessels when the vessels had a crew and perhaps would again be a member of the crew if and when the vessel or vessels sailed, does not change the fact that *on the day when the injury occurred*, there was no crew and he was not performing the services of a crew member but only that of a watchman or caretaker. *Taylor v. McManigal*, 89 F. (2d) 583 (1937) (aff'g. 14 F. Supp. 419). It is the status of the employee (determined from his

duties) at the time of injury which decides his right to coverage under the Act. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244; particularly as to his status as a crew member. *Long Island R. R. Co. v. Lowe*, 145 F. (2d) 516 (C.A. 2, 1944); *Merritt-Chapman & Scott Corp. v. Willard* - F(2) - (C.A. 2, 6/6/51). Persons who are employed principally as caretakers or watchmen of a vessel in between trips, are not considered to be members of the crew. *Union Oil Co. v. Pillsbury, Deputy Commissioner*, 63 F. (2d) 925 (C.A. 9); *Seneca Washed Gravel Company v. McManigal*, 65 F. (2d) 779 (C.A. 2); *Hillscone S. S. Co. v. Pillsbury, Deputy Commissioner*, 136 F. (2d) 965 (C.A. 9, 1943); *Puget Sound Navigation Co. v. Marshall, Deputy Commissioner*, 31 F. Supp. 903 (Wash. 1940); *La Crosse Dredging Corporation v. McManigal, Deputy Commissioner*, 58 F. Supp. 831 (1945). In *The Union Oil Company case, supra*, as in the instant case, the crew had been discharged and one of the officers was re-engaged as watchman during repairs; he was held to be not a member of the crew.

SUMMARY

The authorities uniformly hold that the question whether the employee is a member of a crew is one of fact. *South Chicago Coal and Dock Co. v.*

Bassett, Deputy Commissioner, 309 U.S. 251 (1940); *Puget Sound Freight Lines v. Marshall, Deputy Commissioner*, 125 F. (2d) 876 (C.A. 9, 1942); *Schantz v. American Dredging Co.*, 138 F. (2d) 534 (C.A. 3, 1943); *Bowen v. Shamrock Towing Co.*, 139 F. (2d) 674 (C.A. 2, 1943). As we understand the above decisions, it is only where *no other conclusion can be drawn* from the basic findings that the question becomes one of law. This is so even where the facts are undisputed: *South Chicago Coal and Dock Co. v. Bassett, supra; Puget Sound Freight Lines v. Marshall, supra.* Accord: *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company*, 330 U.S. 469, 478 (1947). Compare: *Gray v. Powell*, 314 U.S. 402, 412 (1941); *United States v. Morgan*, 313 U.S. 409 (1941).

We have not discussed *Anderson v. Manhattan Lighterage Corp.*, 148 F. (2d) 971 (C.A. 2, 1945) where the court held that a lighterage captain was not a member of a crew, nor *United States Lighterage Corporation v. Hoey*, 142 F. (2d) 484 (C.A. 2, 1944), nor *Berwind-White Coal Mining Co. v. Rothensies*, 137 F. (2d) 60 (C.A. 3, 1943), nor *Walling v. Bay State Dredging Co.*, 149 F. (2d) 346 (C.A. 1, 1945), because, while they construed the term "member of crew", the construction there related to the use of the

words in Acts other than the Longshoremen's Act and as stated by the Supreme Court "we find little aid in considering the use of the term 'crew' in other statutes having other purposes" (quotation is from *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner*, 309 U.S. 251). Since the word "crew" does not have an "unvarying legal meaning", the issue must be determined according to the facts in the particular case. *South Chicago, etc., supra* also *Bowen v. Shamrock Towing Co.*, 139 F. (2d) 674 (C.A. 2, 1943).

We believe that it cannot be held *as a matter of law* under the evidence that deceased on the day of the injury was a member of a crew within the meaning of the Longshoremen's Act. Cf. *Anderson v. Olympian Dredging Co.*, 57 F. Supp. 827 (Cal. 1944), which was decided since the Norton decision and *Smrekar v. Bay & River Navigation Co.*, 160 P. (2d) 85 (Cal. 1945) cert. den. 66 S. Ct. 338, which contains a complete discussion of cases before and after the Norton decision by the Supreme Court.

CONCLUSION

In view of the above, it is respectfully submitted that the order of the deputy commissioner was in accordance with law and should have been sustained by the court below. The order or orders of the court below setting aside the award was improper and should be reversed with directions to dismiss the complaint.

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